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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA,
18 SAN FRANCISCO DIVISION

19
20 SONOS, INC., Case No. 3:20-cv-06754-WHA
21 Plaintiff and Counter-defendant,
22 v. Consolidated with
Case No. 3:21-cv-07559-WHA
23 GOOGLE LLC, **SONOS, INC.'S BRIEF REGARDING**
IFTTT
24 Defendant and Counter-claimant. Judge: Hon. William Alsup
25 Courtroom: 12, 19th Floor
Trial Date: May 8, 2023

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1 The Court should not strike Mr. Malackowski's opinions related to IFTTT.
 2 Mr. Malackowski's IFTTT analysis is a reliable, relevant, and well-accepted methodology for
 3 estimating a reasonable royalty. As the Federal Circuit explains:

4 [T]here may be more than one reliable method for estimating a reasonable royalty.
 5 See, e.g., *In re Innovatio IP Ventures, LLC Patent Litig.*, MDL 2303, 2013 WL
 6 5593609, at *30-40 (N.D. Ill. Oct. 3, 2013) (undertaking a detailed evaluation of
 7 the different methods proposed by the parties of valuing the patents at issue). For
 8 example, a party may use the royalty rate from sufficiently comparable licenses,
 9 **value the infringed features based upon comparable features in the**
 10 **marketplace**, or estimate the value of the benefit provided by the infringed
 11 features by a comparing the accused product to non-infringing alternatives. All
 12 approaches have certain strengths and weaknesses and, depending upon the facts,
 13 one or all may produce admissible testimony in a single case. It is common for
 14 parties to choose different, reliable approaches in a single case and, when they do,
 15 the relative strengths and weaknesses may be exposed at trial or attacked during
 16 cross-examination. **That one approach may better account for one aspect of a**
 17 **royalty estimation does not make other approaches inadmissible.**

18 *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1315 (Fed. Cir. 2014) (emphasis added), overruled
 19 on other grounds by *Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015)
 20 (presumption regarding means-plus-function claims). Here, Mr. Malackowski "value[d] the
 21 infringed features based upon comparable features in the marketplace," *id.*, and used that value in
 22 his *Georgia-Pacific* analysis alongside other data points.

23 As Mr. Malackowski explained in his testimony on Friday, he used the hypothetical
 24 negotiation framework to evaluate how much Google would be willing to pay Sonos to use the
 25 patented invention. 5/12/23 Trial Tr. 1086:16-1087:15. Mr. Malackowski considered the
 26 competitive relationship between Sonos and Google, the value of the technology, the value of the
 27 patents themselves, how Sonos and Google would share that value, and whether Google has
 28 viable noninfringing redesigns for the patents. *Id.* 1089:7-11.

29 As one part of that analysis, he "looked to see if there were other technologies that would
 30 provide a similar benefit, and I looked to see if there was a nexus between those technologies in
 31 both the benefits and the parties here." *Id.* 1123:21-24. Mr. Malackowski explained that IFTTT
 32 is a "technology that allows you to group speakers." *Id.* 1124:25-1125:1. Specifically, in IFTTT
 33 you can "group your speakers, save those groups, and invoke them later." *Id.* 1125:13-14; *see*

also, e.g., *M2M Sols. LLC v. Sierra Wireless Am., Inc.*, No. CV 14-1102-RGA, 2020 WL 7767639 at *18 (D. Del. Dec. 4, 2020) (allowing testimony based on “benchmark product [that] has comparable functionality to the infringing features of the accused AirVantage software system because it ‘provides remote device management of a programmable device’ such as the Accused Products.”). Mr. Malackowski took the lowest sale price of the version of IFTTT that provided a technologically comparable solution to the speaker grouping problem (\$1.99 for the “pro plan”). 5/12/23 Trial Tr. 1126:1-1128:20; *see also* 5/16/23 Trial Tr. 1208:11-22. And Mr. Malackowski explained that Google would recognize that consumers will pay a monthly \$1.99 fee for a product that *includes* comparable technology. *Id.* 1129:5-12.

He then reduced that \$1.99 by 90% in order to exclude the non-comparable functions of that product. *Id.* 1131:5-19. More specifically, Mr. Malackowski noted that a consumer would need to dedicate *at least* two (of the 20) multi-function applets provided by the “pro plan” to create a comparable technological solution. 5/12/23 Trial Tr. 1131:12-19; 5/16/23 Trial Tr. 1218:25-1219:8. Thus, he apportioned the *price* of IFTTT down by 90% so that it reflects the number of applets necessary to produce a comparable technological solution to the one claimed by the patents.¹

Google has criticized this step by pointing out that the two applets could be *redeployed* for some other purpose. 5/12/23 Trial Tr. 1146:8-18. But as soon as someone did that, the saved groups would disappear and they would therefore *lose* the comparable functionality. Put differently, in order to have functionality *comparable* to the functions provided by the patent (which allows you to save speaker groups and then invoke them whenever you want) you would have to *dedicate* two applets to that task. So a consumer who wanted to use the features of IFTTT that *provide* comparable technology would have to dedicate at least 10% of applets provided by the pro plan to “solve” the problem of saving and later invoking speaker groups.

¹ He also noted that his methodology *started* from a place that excluded the vast majority of IFTTT functions – i.e., all of those functions that are available *without* paying for the pro plan. 5/12/23 Trial Tr. 1125:19-1126:8. Put differently, because the consumer does *not* need to pay \$1.99 for those features, they are *not part* of what the consumer gets in exchange for his or her money. *Id.*

1 Thus the “price” a consumer would pay to solve the problem addressed by the patents (admittedly
 2 in a less-good way) would be 10% of the \$1.99 price of IFTTT.

3 But Mr. Malackowski did not stop there. Using the hypothetical negotiation as a
 4 framework, Mr. Malackowski figured that Google would not agree to value the comparable
 5 technology at a \$1.99 per month *every month*. *Id.* 1129:5-12; *see Via Vadis, LLC v. Blizzard Ent., Inc.*, No. 1:14-CV-00810-LY, 2021 WL 5908599 at *2, *5 (W.D. Tex. Dec. 14, 2021) (approving
 6 of opinion where expert used later-adopted fee “calculated from the market value of a
 7 ‘benchmark product.’”). Instead, in the hypothetical negotiation, he noted that Google would
 8 push for a per unit fee – which is exactly how Google gets paid when applications are sold in the
 9 Google Play store. *Id.* 1091:14-18. For this reason, Mr. Malackowski further *limited* the monthly
 10 recurring fee to the expected 2.5-year life of a smartphone. *Id.* 1129:17-24. And he did this for
 11 the speakers too, even though speakers last for many years longer than that. *Id.*

12 Mr. Malackowski also reduced the royalty rate by 71% to account for the percent of
 13 households that have three or more speakers. *Id.* 1132:1-7. Although neither patent *requires* the
 14 presence of multiple speakers to infringe (*see, e.g.*, Dkt. 720, Sonos’s Trial Brief Regarding
 15 Infringement Of The ’966 Patent) by apportioning the price in this way Mr. Malackowski aligned
 16 his analysis to reflect the percent of the speaker-owning population most likely to find value in
 17 the *capability* provided by the patents. 5/12/23 Trial Tr. 1132:1-7. As he explained, this was a
 18 reasonable approach within the framework of the hypothetical negotiation because it would
 19 reflect and account for Google’s desire to pay for a capability only to the extent it would create
 20 value for its users. *Id.*; *see Kaufman v. Microsoft Corp.*, No. 16 CIV. 2880 (AKH), 2021 WL
 21 242672 at * 7 (S.D.N.Y. Jan. 25, 2021), aff’d, 34 F.4th 1360 (Fed. Cir. 2022) (approving of
 22 expert opinion that “estimated a rate based on comparable products and estimated the number of
 23 users the parties would have anticipated”). By using the percent of the population that *already*
 24 owns three speakers, this approach errs in favor of Google because, as Mr. Malackowski
 25 explained, consumers who *don’t yet* own three speakers would be excluded, even though they
 26 gain value from the capability provided by the patents insofar as (i) it provides extensibility to
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1 those consumers who own fewer than three speakers and (ii) some portion of the excluded
 2 population will buy more speakers in the future and thereby *realize* value in that way as well.
 3 5/12/23 Trial Tr. 1132:8-21.

4 Once he had figured out the (apportioned, adjusted) *price* that consumers would pay for
 5 comparable technology in the marketplace, Mr. Malackowski then figured out how much of that
 6 price would flow to Google and how much would flow to Sonos. Here, Mr. Malackowski used
 7 the same 70/30 split that Google uses with all other technology providers in the marketplace. *Id.*
 8 1135:8-17. Google has criticized this split on the grounds that, it believes, Google should receive
 9 70% because – in the hypothetical negotiation Google would take the engineering cost and risk.
 10 *Id.* 1157:8-17. But Mr. Malackowski explained that Google has asserted that the *implementation*
 11 of the claimed technology is straight forward and inexpensive – so Google cannot now claim that
 12 that those costs would tilt the hypothetical negotiation in its favor and away from the split it uses
 13 with other technology providers. *Id.*

14 After determining the *amount* a user would pay and the *proportion* of that amount that (in
 15 the hypothetical negotiation) the parties would agree would flow to Sonos, Mr. Malackowski
 16 multiplied that royalty rate by the number of accused units. *Id.* 1136:9-1137:14. Google does not
 17 appear to challenge these aspects of Mr. Malackowski’s method.

18 Mr. Malackowski’s testimony is supported by Dr. Almeroth’s testimony describing the
 19 technological comparability of IFTTT. 5/11/23 Trial Tr. 821:18-829:22; TX442 (Screenshots
 20 Related to Testing of IFTTT App). Dr. Almeroth showed that the IFTTT app comes preloaded
 21 with Sonos and Spotify functions like “start” playback and “resume” playback. TX442 at 3-4;
 22 5/11/23 Trial Tr. 826:1-7, 924:6-9. Using those preprogrammed functions, Dr. Almeroth created
 23 his own applet that would save overlapping speaker groups, and then (when invoked) cause
 24 playback to start on two speakers at the same time. TX442 at 7; 5/11/23 Trial Tr. 826:8-828:24.

25 There has been some confusion about the ability of IFTTT to “synchronize” music
 26 between two zone players. *E.g.*, 5/12/23 Trial Tr. 1144:4-23. If a user sets up a speaker group on
 27 IFTTT, the speakers will start playing the same music at the exact same time. 5/11/23 Trial Tr.

1 921:10-923:16. The speakers will not, however, coordinate with each other to ensure that the
 2 music stays the same over time. *Id.* And over time, small variations in the physical hardware
 3 (particularly in the clocks) are likely to cause the music playing on the two speakers to drift
 4 slowly out of alignment with each other. So, the IFTTT speaker grouping is useable but in certain
 5 use cases, it is not as good of a listening experience as the claimed invention. 5/12/23 Trial Tr.
 6 1145:10-1146:7. But it is still a comparable technology. *Id.* 1145:24; 5/11/23 Trial Tr. 822:4-18;
 7 *see also Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1330 (Fed. Cir. 2014) (“we have never
 8 required identity of circumstances” for economic or technological comparability). Indeed,
 9 Google’s expert, Dr. Schonfeld has opined that U.S. Patent 7,603,414 (in the Outland Research
 10 Agreement) is technologically comparable even though it involves technology to “jointly listen to
 11 the collaboratively selected musical media in *approximate synchronicity*.” TX2675 at 1.

12 The Court has also questioned whether anyone has used IFTTT to create speaker groups.
 13 The answer is that we don’t know. 5/12/23 Trial Tr. 1146:19-1148:2. We do know that IFTTT
 14 has *premade* speaker controls that work with Sonos speakers and which can be *configured* to
 15 perform the comparable functions by pressing a small handful of buttons; nothing remotely like
 16 writing code is required. TX442 at 3-4; 5/11/23 Trial Tr. 826:1-7, 924:6-9. Moreover, since a
 17 comparable, but better version of speaker grouping is offered by Google and by Sonos, it would
 18 not be surprising if only a small number of people have used IFTTT to group speakers. 5/12/23
 19 Trial Tr. 1147:1-12; 5/16/23 Trial Tr. 1215:10-17. Moreover, as noted above, the claims are
 20 directed to a capability, not to a method in which the amount of infringement depends on usage.
 21 Where method claims are at issue, it makes sense to apportion by usage data in order to account
 22 for the amount of infringement in the royalty base. *E.g., i4i Ltd. P’ship v. Microsoft Corp.*, 598
 23 F.3d 831, 856 (Fed. Cir. 2010) (approving use of “a survey designed to estimate the amount of
 24 infringing use” of a method claim). Here the amount of infringement is not a function of usage.
 25 But even if it were:

26 1. Sonos sought “information about ‘however Google tracks when there are multiple
 27 speakers that could be grouped,’ Google agreed to investigate. We [e.g., Google,]
 28

1 have been unable to locate such data.” Caridis Decl. Ex. 1 (May 17, 2022 Email
 2 from J. Ma to A. Caridis).

3 2. Sonos sent multiple interrogatory requests requesting usage data. *See* Caridis
 4 Decl. Exs. 2-3 (Requests For Production Nos. 22, 73, 74, 85).
 5 3. The information Google provided does not allow someone to know how many
 6 unique users have configured saved groups or are invoking groups during the
 7 damages time period. Caridis Decl. Ex. 4 (1/13/23 Bakewell Rebuttal Rep.
 8 ¶¶ 266-70 & Ex. 4.3).

9 And Mr. Malackowski did apportion by the percent of households that are currently in
 10 position to obtain immediate value from the technology -- which is an appropriate way to
 11 apportion claims directed to *capability* rather than use. 5/12/23 Trial Tr. 1132:1-21. Indeed,
 12 because this apportionment *excludes* everyone who owns fewer than three speakers, and because
 13 (from a legal perspective) the plaintiff *should* be able to charge a royalty for every infringing
 14 device, this apportionment method reduces the royalty *more* than Sonos should have to. To be
 15 sure, it doesn’t reduce the royalty as much as Google would *like* to. But Google’s alternative
 16 vision as to the best factors to use in apportionment is a proper matter for cross examination.
 17 *Vectura Ltd. v. Glaxosmithkline LLC*, 981 F.3d 1030, 1041 (Fed. Cir. 2020). And given that
 18 Google *did* cross examine on precisely this issue, it is one the jury can fairly evaluate and not
 19 something that should give rise to exclusion. 5/16/23 Trial Tr. 1212:12-1213:10.

20 Google also questions the comparability of IFTTT to the Home App because IFTTT can
 21 be used to do millions of different things. *Id.* 1141:9-1142:24. But one of Google’s main themes
 22 at trial is that *the Home App* can be used to do millions of different things. *Id.* 1153:21-1154:9;
 23 5/8/23 Trial Tr. 221:19-222:12 (Google’s Opening Statement). But the problem is that (as the
 24 Court has noted) Google gives the Home App away for free. So you cannot start with the Home
 25 App and apportion *its* price to the technological footprint. Instead, if you want to “value the
 26 infringed features based upon comparable features in the marketplace” you have to start with
 27 another application (like IFTTT) that has both a technologically comparable feature ***and*** a known
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1 market price and apportion down from there. That is what Sonos did here, and there is nothing –
 2 from either the perspective of economic logic, or the damages law of the Federal Circuit – that
 3 makes the approach unreliable.

4 Indeed, as Sonos explained in its opposition to Google’s motion in *limine* No. 1, Dkt. 607-
 5 11, and at the pretrial hearing on that motion, 5/3/23 Trial Tr. 33:11-34:9, numerous cases
 6 approve of similar methodologies to the one Mr. Malackowski employs in this case. For
 7 example:

8 ***Apple Inc. v. Motorola, Inc., 757 F.3d 1286 (Fed. Cir. 2014)***

9 Apple asserted a patent (the ’949 patent) covering the use of finger contacts to control a
 10 touchscreen on a computer. *Id.* at 1294-95. To value the ’949 patent, Apple’s damages expert
 11 looked at the value of a comparable product—the “Magic Trackpad,” which is a touchpad for use
 12 with a computer instead of a mouse. *Id.* at 1316. After a technical expert opined that the Magic
 13 Trackpad “includes features comparable to the claimed features,” the damages expert then offered
 14 opinions on how to isolate the value of the claimed features from the price of the Magic
 15 Trackpad. *Id.* The damages expert eliminated (1) the value attributable to the Magic Trackpad’s
 16 wireless functionality and (2) additional touch features that were not included in the asserted
 17 claims. *Id.* He then compared the remaining value to rates paid in other licenses for touchscreen
 18 technology and the cost and acceptability of noninfringing alternatives. *Id.* at 1316-17.

19 The district court excluded this opinion and the Federal Circuit reversed. The Federal
 20 Circuit explained that experts may use “comparable benchmark products” to value a patented
 21 invention. *Id.* at 1318. Specifically, the Court approved of a methodology that “began with an
 22 existing product containing features he contended were similar to the asserted features (the
 23 Trackpad). Next, [the damage’s expert] attempted to isolate the value of these similar features by
 24 valuing other, non-claimed features of the Trackpad and subtracting this value.” *Id.* This
 25 “estimate [of] what consumers will pay for the infringed features by evaluating what consumers
 26 have actually paid for comparable features” adequately supported the expert’s reasonable royalty
 27 opinion. *Id.* at 1319. And to the extent Apple’s expert had not identified “an accurate

1 benchmark, Motorola is free to challenge the benchmark or argue for a more accurate benchmark.
 2 But such an argument goes to evidentiary weight, not admissibility, especially when, as here, an
 3 expert has applied reliable methods to demonstrate a relationship between the benchmark and the
 4 infringed claims.” *Id.*

5 ***i4i Ltd. P'ship v. Microsoft Corp., 598 F.3d 831 (Fed. Cir. 2010), aff'd, 564 U.S. 91 (2011)***

6 i4i claimed “an improved method for editing documents containing markup languages like
 7 XML.” *Id.* at 840. The patentee’s damages expert “chose an appropriate ‘benchmark’” by
 8 selecting the retail price of a product called XMetaL as his starting point for a reasonable royalty.
 9 *Id.* at 853. He then discounted the retail price by Microsoft’s profit margin and a 25% profit split
 10 between i4i and Microsoft. *Id.* (The 25% “rule of thumb” was rejected the following year in
 11 *Uniloc*, but that is not relevant here.) Finally, the expert “adjusted the baseline royalty rate of
 12 (\$96) using the factors set out in *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp.
 13 1116, 1120 (S.D.N.Y. 1970).” *Id.* The Federal Circuit endorsed this methodology, as well as its
 14 application to the facts of the case.

15 As relevant here, the Court approved the use of XMetaL “as a benchmark” even though
 16 “XMetaL has many additional features besides custom XML editing.” *Id.* at 854. The Court
 17 explained:

18 As i4i’s expert explained, the facts were drawn from internal Microsoft
 19 documents, publicly available information about other custom XML editing
 20 software, and a survey designed to estimate the amount of infringing use. Thus,
 21 these facts had a sufficient nexus to the relevant market, the parties, and the
 22 alleged infringement. While the data were certainly imperfect, and more (or
 23 different) data might have resulted in a “better” or more “accurate” estimate in the
 24 absolute sense, it is not the district court’s role under Daubert to evaluate the
 25 correctness of facts underlying an expert’s testimony. [citation omitted]. Questions
 26 about what facts are most relevant or reliable to calculating a reasonable royalty
 27 are for the jury. The jury was entitled to hear the expert testimony and decide for
 28 itself what to accept or reject.

29 *Id.* at 856. Thus, the district court properly admitted the expert testimony on damages.

1 ***Summit 6, LLC v. Samsung Elecs. Co., 802 F.3d 1283 (Fed. Cir. 2015)***

2 The claimed invention in *Summit 6* was a method of uploading pictures from a
 3 smartphone to another location. The patentee’s damages expert “started by estimating that the
 4 carriers pay Samsung \$14.15 to include a camera component in Samsung’s phones.” *Id.* at 1296.
 5 The expert used various survey and financial data to arrive at \$14.15. *Id.* at 1297. The expert
 6 then apportioned that \$14.15 based on the percentage of customers who used the infringing
 7 method (20.8%), Samsung’s profit margin, and application of the Nash Bargaining Solution to
 8 split the profits attributable to the infringing use. *Id.* This “damages methodology was based on
 9 reliable principles and was sufficiently tied to the facts of the case.” *Id.* at 1298.

10 The Court further rejected the argument that the testimony should be excluded because it
 11 “was not peer-reviewed or published.” *Id.* Because “the fact-based nature of [the expert’s]
 12 damages testimony made it impractical, if not impossible, to subject the methods to peer review
 13 and publication,” and because “[p]ublication … is not a *sine qua non* of admissibility,” the Court
 14 still found the testimony admissible and appropriate for the factfinder to resolve. *Id.* (quoting
 15 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993)).

16 ***Arctic Cat Inc. v. Bombardier Recreational Prods. Inc., 876 F.3d 1350 (Fed. Cir. 2017); Arctic***
 17 ***Cat Inc. v. Bombardier Recreational Prods., Inc., No. 14-CV-62369, 2016 WL 9402395, at***
****11-13 (S.D. Fla. May 3, 2016) (district court’s Daubert opinion)***

18 The Federal Circuit agreed that patentee’s damages expert could look to the price
 19 difference between products with infringing braking technology (OTAS) and a later product with
 20 a more desirable braking technology (iBR). The damages expert “properly relied on the opinion
 21 of another Arctic Cat expert, Dr. Cuzzillo, who opined that OTAS and iBR are of comparable
 22 technological and safety value.” 876 F.3d at 1369. Thus, the value of the new “iBR” product
 23 was an appropriate “benchmark” to “serve as the basis for the jury’s royalty award.” *Id.*
 24 Whatever differences existed between the claimed technology and the benchmark were
 25 “appropriately addressed through cross-examination” and not exclusion. *Id.* at 1370. The district
 26 court thus properly admitted expert testimony “that the OTAS feature carries a monetary value
 27 equivalent to the iBR brake” as a basis for the reasonable royalty. 2016 WL 9402395, at *11.

1 ***M2M Sols. LLC v. Sierra Wireless Am., Inc., No. CV 14-1102-RGA, 2020 WL 7767639 (D.***
 2 ***Del. Dec. 4, 2020), report and recommendation adopted, No. 14-CV-01102-RGA, 2021 WL***
 3 ***7441706 (D. Del. Mar. 31, 2021)***

4 In *M2M*, plaintiff presented a damages methodology based on “a third-party product
 5 offering, identified as the Soracom benchmark product.” *Id.* at *18. The damages expert relied
 6 on “technical opinions to establish that the Soracom benchmark product has comparable
 7 functionality to the infringing features of the accused AirVantage software system because it
 8 ‘provides remote device management of a programmable device’ such as the Accused Products.”
 9 *Id.* The expert “also evaluated Soracom’s public product information to determine that the
 10 Soracom benchmark product uses the same protocol to support remote management of devices
 11 that may also be used in the Accused Products.” *Id.* He then used “public pricing information
 12 from Soracom to determine that the upfront \$1.00 per device cost ‘is indicative of the market
 13 pricing of benchmark products that provide similar functionalities as those described’ by the
 14 ’717 patent.” *Id.* The court found this “sufficient to establish the comparability of the allegedly
 15 infringing features in the Accused Products and the Soracom benchmark product, and testing the
 16 merits of the comparison is more appropriately addressed through cross-examination and the
 17 presentation of contrary evidence.” *Id.* Thus, the court agreed that “a royalty can be reliably
 18 determined by valuing the infringing features based on comparable features in the marketplace.”
 19 *Id.*

20 ***Via Vadis, LLC v. Blizzard Ent., Inc., No. 1:14-CV-00810-LY, 2021 WL 5908599 (W.D. Tex.***
 21 ***Dec. 14, 2021)***

22 The patentee asserted patents on the operation of peer-to-peer networks, and claimed that
 23 “Blizzard infringed the asserted claims by using the BitTorrent Protocol.” *Id.* at *1.
 24 The damages expert used “a royalty rate calculated from the market value of a ‘benchmark
 25 product.’” *Id.* at *2. The benchmark products, “BitTorrent and µTorrent” were free at the time of
 26 the hypothetical negotiation, but were later offered for a fee. *Id.* at *5. The expert used the later
 27 fee, adjusted it based on technological apportionment, and then adjusted it for Blizzard’s
 28 operating margin. *Id.* The district court allowed this methodology to go to the jury, because it

1 “identif[ied] comparable BitTorrent products in the marketplace, technically apportion[ed] to the
 2 ’521 Patented features, and further apportion[ed] to account for Blizzard’s costs.” *Id.* “[T]o the
 3 extent the defendant found the comparison problematic, ‘that is a line of attack more
 4 appropriately addressed through cross-examination.’” *Id.* (citation omitted).

5 ***Kaufman v. Microsoft Corp., No. 16 CIV. 2880 (AKH), 2021 WL 242672 (S.D.N.Y. Jan. 25,***
 6 ***2021), aff’d, 34 F.4th 1360 (Fed. Cir. 2022)***

7 In *Kaufman*, the “Plaintiff’s damages expert, Brian Dies, estimated a rate based on
 8 comparable products and estimated the number of users the parties would have anticipated based
 9 on analysis of Google Trends. *See* Trial Tr. at 669:18-677:1, 680:3-686:16 (Dr. Shasha’s
 10 discussion of the comparability of products used in Dies’s analysis). Dies isolated the rate that
 11 would be attributable to the infringing function. *See, e.g.*, Trial Tr. at 785:13-23. Further, in
 12 applying discount rates, he took into account that the parties might expect a decline in users over
 13 time. Trial Tr. at 794:24-795:4. Defendant may take issue with these methods of estimation, but
 14 there was sufficient grounding in the evidence to permit the jury to make reasonable inferences
 15 rather than rely on speculation.” 2021 WL 242672, at *7. The district court denied Microsoft’s
 16 motion for a new trial on damages because “there was sufficient grounding in the evidence to
 17 permit the jury to make reasonable inferences rather than rely on speculation.” *Id.*

18 * * *

19 As shown above, Mr. Malackowski’s overall analysis, and his IFTTT analysis in
 20 particular, was a reliable, relevant, and well-accepted methodology for estimating a reasonable
 21 royalty. The Court should instruct the jury that the jury should consider Mr. Malackowski’s
 22 IFTTT opinions for whatever weight the jury believes they are entitled to in light of his testimony
 23 and Google’s cross examination, and that the Court has no opinion on the amount of damages that
 24 should be awarded, if the patents are found valid and infringed. Google, of course, “is free to
 25 challenge the benchmark or argue for a more accurate benchmark. But such an argument goes to
 26 evidentiary weight, not admissibility.” *Apple*, 757 F.3d at 1319.

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2 Dated: May 16, 2023

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5 Clement Seth Roberts

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